90-669

No. 90-___

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PHILADELPHIA MARINE TRADE ASSOCIATION,
Petitioner,

v.

LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, et al.,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Does a Federal Court have jurisdiction under Section 301(a) of the Labor Management Relations Act to issue a preliminary injunction against a "wildcat" strike where the labor agreement contained a broad grievance and arbitration and no strike provision and where the underlying dispute was subject to grievance and arbitration?

PARTIES

The full listing of the parties in this case taken from the caption of the pleadings are as follows:

a. Petitioner.

The Philadelphia Marine Trade Association has no parent or subsidiary companies. Supreme Court Rule 29.1

b. Respondents.

The respondents are Local 1291, International Longshoremen's Association; Joseph Hill, President of Local 1291, International Longshoremen's Association and Warren Anderson a business agent, Local 1291, International Longshoremen's Association.

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INTRODUCTION

This case involves errors of law committed by the lower courts in failing to apply the precept of this Court regarding the issuance of a preliminary injunction involving a labor dispute where the labor agreement contained a broad grievance, arbitration and no strike provision and where the underlying dispute was subject to grievance and arbitration. The respondent argued in the lower courts that the standard for the issuance of a preliminary injunction involving a labor dispute where there is a broad grievance and arbitration and no strike provision is the same as the legal standard regarding an action against a union for damages. This Court on numerous occasions has ruled that industrial disputes should be avoided when the parties have agreed to a no strike clause and a grievance and arbitration procedure. Chaos and industrial strife will occur not only in the

maritime industry but in many other industries unless this Court grants review of this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 909 F.2d 754 (3rd Cir. July 27, 1990), is reproduced as Appendix A (App. A 1a-12a). The Judgement of the court of appeals is reproduced as Appendix B (App. B-13a). The September 25, 1989 not for publication opinion of the district court is reproduced as Appendix C (App. C-14a-24a). The September 25, 1990 order of the district court dated September 27, 1989 is reproduced as Appendix D (App. D-25a).

JURISDICTION

The judgement of the court of appeals was entered on July 27, 1990.

This petition is being filed within 90 days of the judgement of the court of appeals.

The jurisdiction of this court to review the judgement of the Third Circuit is invoked under 29 U.S.C.A. §1254.1 (West Supp. 1990).

STATUTE

The relevant statute is as follows:
Section 301(a) of the Labor Management Relations Act:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §185(a) (1988)

STATEMENT OF CASE

Petitioner, Philadelphia Marine Trade Association (PMTA) is a multi-employer bargaining association which has negotiated collective bargaining agreements with the various Locals of International Longshoremen's Association on behalf of its members. The PMTA has for its membership steamship lines, steamship agents, stevedoring companies and companies rendering services allied to stevedoring, marine terminal operators and companies rendering other services in the maritime industry in the Ports of Philadelphia. Respondent, Local 1291, International Longshoremen's Association (Local 1291) is a chartered local of the International Longshoremen's Association, AFL-CIO. Defendant, Joseph Hill is the President of Local 1291. Defendant Warren Anderson is a business agent of Local 1291.

On November 25, 1986, petitioner entered into a collective bargaining agreement with the respondents for the term October 1, 1986 to September 30, 1989. That contract was mutually extended by the parties until November 30, 1990. There is also a memorandum of agreement which applies to the Southern Stevedoring Company. That company is a stevedore and marine terminal operator which operates at Pier 5, Camden, New Jersey and is a member of the PMTA.

The contract between the PMTA and Local 1291 contains a broad grievance and arbitration clause and no strike provision. The provisions of the contract regarding grievance and arbitration and no strike states:

> 37. Grievance and Arbitration
>
> "All disputes and grievances of any kind or nature whatsoever arising under the terms and conditions of this Agreement and all questions involving the interpretations of this Agreement . . . shall be referred to a Grievance Committee, which shall consist of two members selected by the Employers and two members selected by the Union . . . *There shall be no strike* and no lockout during the pendency

of any dispute or issue while before the Grievance Committee, the Joint Panel or the Arbitrator." (Emphasis Added)

Respondents did not dispute the existence of the contract or that the grievance and arbitration and no strike clause are binding on the parties.

Southern Stevedoring Company selected three house gangs to perform the stevedoring at Pier 5, Camden, New Jersey. On August 4, 1989, Southern Stevedoring placed an order for two gangs for August 7, 1989.

The M/V Argentinian Reefer was berthed at Pier 5, Camden, New Jersey at approximately 0500 hours on August 7, 1989. The vessel was loaded with 3,700 tons of perishable fruit. Southern Stevedoring Company was scheduled to commence discharging the M/V Argentinean Reefer at 0800 hours on August 7, 1989. Local 1291, ILA and its members refused to work the vessel. In addition to the longshoremen ordered to work on August 7, 1989, Southern Stevedoring Company ordered approximately 18 additional members of the ILA to perform coopering, cargo repair work, checking and car loading. There were approximately 60 trucks scheduled for delivery at Southern Stevedoring Company's terminal.

At approximately 7:30 A.M. on August 7, 1989, 20 to 25 pickets appeared at Southern Stevedoring Company's facility at Pier 5, Camden, New Jersey blocking the entrances to the terminal. These men were wearing signs which stated "Nine years is enough", "first in, first out", "DelMonte is unfair". Because of the picketing the discharging operations scheduled for 8:00 A.M. were not able to begin.

The work stoppage on August 7, 1989 was in contravention of the collective bargaining agreement between the parties. On August 7, 1989, petitioner filed a complaint and a motion for temporary restraining order to enjoin the picketing at Southern Stevedoring Company. The district court granted the motion of the PMTA for a temporary restraining order which restrained respondent Local 1291, and any individual represented by that

union; respondent, Joseph Hill and respondent, Warren Anderson from picketing at Southern Stevedoring Company's facility at Pier 5, Camden, New Jersey and from violating the "no strike provision" of the collective bargaining agreement. The district court also granted a rule to show cause why a preliminary injunction should not issue. At approximately 12:00 Noon on August 7, 1989, an agent of the PMTA served individuals at Southern Stevedoring Company with copies of the temporary restraining order and an order to show cause why a preliminary injunction should not issue.

On August 17, 1989, the district court scheduled a hearing regarding petitioner's motion for a preliminary injunction. James Peoples, a member of Local 1291, ILA, who picketed on August 7, 1989 requested an opportunity to testify at the hearing. Mr. Peoples testified that the picketers were not pleased with Southern Stevedoring Company's selection of the house gangs. He testified that if the district court removed restraints on picketing at Southern Stevedoring Company another strike would occur.

On August 17, 1989, the district court from the bench indicated that the authority regarding a preliminary injunction involving a breach of a no strike clause was controlled by *Consolidated Coal Company v. Local 2216*, 779 F.2d 1274 (7th Cir. 1985). At the close of the hearing the district court judge requested the parties to submit supplemental memoranda of law. On September 25, 1989, the district court entered an order denying the motion of the PMTA for a preliminary injunction. On October 4, 1989, the PMTA filed a notice of appeal to the Third Circuit. Petitioner and respondents filed briefs with the United States Court of Appeals for the Third Circuit. Oral argument was held on April 2, 1990. On April 24, 1990, Chief Deputy Clerk for the United States Court of Appeals for the Third Circuit sent a letter to counsel stating that "the court would like counsel to comment on the applicability, if any, of Section 7(a) of Norris LaGuardia Act, 29 U.S.C. §107(a) 1982. See e. g. *United Steelworkers of America v. National Labor Relations Board*, 530 F.2d 266 (3rd Cir. 1976)." Petitioner and respondents filed supplemental briefs with the court of appeals.

On July 27, 1989, the court of appeals filed an opinion and instructed the clerk to enter a judgement affirming the order of the district court which denied petitioner's application for a preliminary injunction.

THE DECISIONS OF THE LOWER COURT

The lower courts failed to apply the precept for injunctive relief (App. A. 1a-12a) and (App. C. 14a-24a).

REASONS FOR GRANTING THE WRIT

I.

THE DECISIONS OF THE LOWER COURTS ARE IN APPARENT CONFLICT WITH THIS COURT'S RULING IN BOYS MARKETS.

This Court in *Boys Markets v. Retail Clerks Local Union 770,* 398 U.S. 230 (1970) established the precept for a federal court to issue an injunction involving a labor dispute that is subject to arbitration. The Court held that:

> When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity — whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." 398 U.S. at 254, 90 S.Ct. at 1594 (quoting *Sinclair Ref. Co. v. Atkinson,* 370 U.S. 195, 228, 82 S.Ct. 1328, 1346, 8 L.Ed.2d 440 (1962) (dissenting opinion) (emphasis in original).

In *Carbon Fuel v. United Mine Workers of America*, 444 U.S. 212 (1979) this Court established another legal precept regarding an action for damages against the union. The question that was presented for this Court's determination in *Carbon Fuel* was whether an international union which neither instigates, supports, ratifies nor encourages "wildcat strikes" engaged in by local unions in violation a collective bargaining agreement, may be liable for damages to an affected employer if the union did not use all reasonable means available to prevent a strike or bring about its termination. The Court analyzed Sections 301(b) and 301(e) of the Labor Management Relations Act. Section 301(b) states that a union "shall be bound by the acts of its agents" and Section 301(e) states that "the common law of agency shall govern in determining whether a person is acting as an agent of another person". The Court ruled in *Carbon Fuel:*

> The legislative history is clear that Congress limited the responsibility of unions for strikes in breach of contract to cases when the union may be found responsible according the common-law rule of agency. 44 US 216

Petitioner met all the requirements of *Boys Markets*[1] and the requirements for a preliminary injunction, *ECRI v. McGraw Hill, Inc.*, 809 F.2d 223 (3rd Cir. 1987).[2] The district court and court of appeals applied the standard for an action for damages

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1. The record in this litigation establishes:
   1.) The August 7, 1989 work stoppage was in breach of the no strike clause;
   2.) The petitioner and respondent union were contractually bound to arbitrate all contractual grievances including the selection of house gangs and
   3.) The injunction was warranted under principles of equity jurisdiction.
2. Petitioner met the criteria for a preliminary injunction:
   1.) Petitioner demonstrated a reasonable probability of success on the merits;
   2.) Petitioner will be irreparably injured by the denial of a preliminary injunction;
   3.) The granting of the preliminary injunctive relief will not result in greater harm to the respondents, and
   4.) Granting preliminary relief will be in the public interest.

and did not consider the criteria of *Boys Markets*, regarding injunctive relief.

A. ERRORS COMMITTED BY THE DISTRICT COURT

In the opinion dated September 25, 1989, the district court states: "the three recognized theories for holding a union responsible for illegal actions of its members are (1) the best efforts theory; (2) the mass action theory and (3) the common law rule of agency." (App. C-19a)

The district court explained the three theories and cited *Eazor Express Inc. v. International Brotherhood of Teamsters*, 520 F.2d 931 (3rd Cir. 1975); *United States Steel Corporation v. United Mine Workers of America*, 534 F.2d 1063 (3rd Cir. 1976); *Consolidated Coal Company v. United Mine Workers of America*, 725 F.2d 1258 (10th Cir.); *Carbon Fuel Company v. United Mine Workers of America*, 444 US 212 (1979); *C & K Coal Company v. United Mine Workers*, 704 F.2d 690 (3rd Cir. 1983) and *Airco Speer Carbon Graphite v. Local 502, International Union of Electrical, Radio and Machine Workers of America*, 494 F. Sup. 872 (W.D.Pa. 1980) (App. C-19a-21a). All of the authorities cited by the district court involved actions for damages and not injunctive relief.

B. ERRORS COMMITTED BY THE COURT OF APPEALS.

The court of appeals applied the wrong legal precept and committed the following errors of law:

First: The Third Circuit ruled "three theories have been advanced under which unauthorized picketing by members may be attributed to the union for injunction purposes. They are (1) the common law rule of agency, (2) the "mass action" theory, and (3) the best efforts theory." (App. A-8a) The court of appeals discussed these three theories (App. A-8a-11a).

Second: The decision of the court of appeals is in error since the court suggested Section 7(a) of the Norris-LaGuardia Act, 29 USC Section 107(a) (1988), is controlling and permits injunctions involving industrial disputes only if unlawful acts are established (App. A-6a). The court noted that it could not find

any authority for equating a breach of contract with unlawful acts and cited H. H. Perritt, Jr., Labor Injunctions, Section 3.22 (1986). The court did not accurately quote Professor Perritt. At Section 3.22 Professor Perritt states "the *Boys Markets* accommodation theory, rather than reaching the same result by equating breaches of contract with the §7(a) criterion, emphasizes the role of the national labor policy of promoting arbitration, rather than the breach of the collectively bargained no strike promise, as justification for issuing injunctions against strikes." H. H. Perritt, Jr., Labor Injunctions, §3.22, Page 134.

Third: The court of appeals is in error since the court applied Sections 301(b) and 301(e) of the Labor Management Relations Act (App. A-7a-8a). This Court in *Boys Markets* did not rule that the district court had to consider subsections 301(b) and 301(e) of the Labor Management Relations Act regarding the issuance of an injunction in a labor dispute that was subject to arbitration.

Fourth: The court of appeals misapplied *Carbon Fuel.* The court found when a moving party was seeking an injunction, the moving party was required to meet the agency requirement as enunciated by this Court in *Carbon Fuel* (App. A-8a).

Finally: The court of appeals misapplied two other decisions in the circuit regarding the issuance of a preliminary injunction involving a wildcat strike. In *United States Steel Corporation v. United Mine Workers of America,* 534 F.2d 1063 (3rd Cir. 1976), the court of appeals held that:

> There is an enormous difference between holding unions financially liable for the wildcat activities of possibly unruly members, and directing the entities and their responsible officers to take steps to specifically perform the contract . . . *Preliminary injunctive relief was appropriate on this record even if on ordinary agency principles they would not be liable for such damages.* Prompt efforts to secure compliance with the injunctions may well have protected the union treasuries from financial liability for failure to take reasonable means to end the strike. Certainly, the court did

not have to permit District 5, the international and their officers to wash their hands of the local dispute merely because they expressed disapproval of the strike. They were required by the contract and could properly be ordered by the court to take steps to vindicate the arbitral process. 534 F.2d at 1074 (Emphasis added)

Philadelphia Newspaper, Inc. v. Newspaper and Magazine Employees Union, 647 F.Supp. 236 (E.D.Pa. 1986) involved an employer's application for a *Boys Markets* injunction involving an unauthorized work stoppage. The district court granted the employer's motion for a preliminary injunction. The court of appeals affirmed the district court 808 F.2d 1517 (3rd Cir. 1986).

In this litigation, the court of appeals acknowledged petitioner's argument that *Carbon Fuel* applies only in an action for damages and that since the petitioner was seeking injunctive relief, the court should apply the holding in *United States Steel Corporation v. United Mine Workers of America.* (App. A-9a) However, the court did not apply the precept as enunciated in *United States Steel Corporation* and ruled: "we think that the case [U. S. Steel] does not dispense with the agency requirement [referring to *Carbon Fuel*], (App. A-10a). The court did not cite *Philadelphia Newspapers Inc.*

Modern labor policy mandates that today's interdependent and technologically advanced economy requires that labor management relations be as peaceful as possible, see Gould, On Labor Injunctions, Unions and the Judges; the *Boys Markets* Case, 1970 Supreme Court Review 215, 267. Similarly where labor and management agree on a forum for a peaceful resolution of disputes, the collective bargaining agreement should be honored and may be enforced by an injunction mandating resort to that forum, The Supreme Court, 1969 Term. 84 Harv. L. R. 1,192 (1970); and Note, The New Federal Law On Labor Injunctions, 79 Yale L. J. 1593, 1599 (1970). Moreover, labor arbitration is a favored alternative forum for dispute resolution *Sinclair Refining Company v. Atkinson,* 370 U.S. 195, 226, *Steelworkers Trilogy, United Steelworkers of America v. American Manufacturing Company,* 363 U.S. 564 (1960); *United*

Steelworkers of America v. Warrior & Gulf Navigation Company, 363 U.S. 574, (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corporation,* 363 U.S. 593 (1960) and Note, Labor Injunctions, Boys Markets and the Presumption of Arbitrability 85 Harv. L.R. 636, 637 (1972).

Petitioner in its complaint requested the district court to order respondents to submit this dispute to arbitration. The petitioner and Southern Stevedoring Company advised the district court and court of appeals that they were willing to participate in grievance or arbitration proceedings regarding the selection of the house gangs by Southern Stevedoring Company. The respondent union did not object to Southern Stevedoring Company's selection of the house gangs and contended in the lower courts that there was no issue to arbitrate. Whatever prompted Local 1291 not to submit the dispute concerning the selection of the house gangs to grievance and arbitration was a decision made by the union. It is undisputed that the no strike provision in the agreement was in effect - ". . . there shall be no strike . . .". The selection of house gangs was a dispute which the union could have taken to grievance and arbitration. The fact that the union decided not to grieve or arbitrate the issue does not modify petitioner's entitlement to a *Boys Markets* injunction, Note, *Boys Markets Injunction,* 90 Harv. L.R. 490 (1977).

This litigation is not moot. James Peoples at the preliminary injunction hearing on August 17, 1989 testified that if the court removed restrains on picketing another strike would occur at Southern Stevedoring Company (App. C-17a) and (App. A-4a). The court of appeals found "the case is therefore not moot." (App. A-4a)

II.

THERE IS A CONFLICT IN THE CIRCUITS WHETHER A DISTRICT COURT HAS JURISDICTION TO ENJOIN A WILDCAT STRIKE.

The First, Second, Third, Fifth and Seventh circuits have enjoined wildcat strikes, *International Detective v. International Brotherhood of Teamsters,* 614 F.2d 29 (1st Cir. 1980);

Elevator Manufacturers' Association of New York, Inc. v. Local 1, 689 F.2d 382 (2nd Cir. 1982); *United States Steel Corporation v. United Mine Workers of America,* 534 F.2d 1063 (3rd Cir. 1976); *Philadelphia Newspapers, Inc. v. Newspaper and Magazine Employees Union,* 647 F.Supp 236 (E.D. Pa 1986) affd. 808 F.2d 1517 (3rd Cir. 1986); *Jacksonville Maritime Association v. ILA,* 571 F.2d 309 (5th Cir. 1978) and *Old Ben Coal Corporation v. Local Union No. 1487 of United Mine Workers of America,* 500 F.2d 950 (7th Cir. 1974).

Professor Perritt states that the courts of appeals, "generally have been willing to enjoin wildcat strikes over arbitrable disputes." H. H. Perritt, Jr., Labor Injunctions, §4.12 Page 154.

The Ninth Circuit in *Hardline Electric Inc. v. IBEW Local 1547,* 680 F.2d 622, 626 N4 (9th Cir. 1982), cert denied 459 U.S. 1170 (1983), established a different precept for the issuance of a labor injunction involving a wildcat strike and ruled that a district court must find a union responsible under common law agency principles as a prerequisite for an injunction. In that case, the court of appeals considered Sections 301(b) and 301(e) of the Labor Management Relations Act. These are the sections of the Labor Management Relations Act that this Court analyzed in *Carbon Fuel.* Professor Perritt is critical of the precept applied by the Ninth Circuit in *Hardline Electric.* He states that the agency approach is difficult to apply. Professor Perritt also explained that the Ninth Circuit's analysis of Section 301(b) and 301(e) was misplaced. He explained that the individual employees are the principal and the union is the agent. Professor Perritt states that the cases discussed in *Hardline Electric* proceed under the assumption that the union is the principal and the individual employees are its agents, H. H. Perritt, Jr., Labor Injunctions, §4.12, Footnote 40, Page 155.

When this court established the precept for the issuance of an injunction involving a labor dispute in *Boys Markets,* the court relied solely on Section 301(a) of the Labor Management Relations Act.

In this litigation, the court of appeals cited *Hardline Electric Inc.* and Sections 301(b) and 301(e) of the Labor Management Relations Act (App. A-7a-8a). The court's analysis

is incorrect that the respondent union, Local 1291 is the principal and the individual employees are the agent of the union (App A. 7a).

In *Boys Markets*, this Court enunciated the standard for the issuance of injunctions in labor disputes. All circuits, including the Third and Ninth Circuit should apply the precept of *Boys Markets*.

III.

THE AUTHORITY FOR A FEDERAL COURT TO ENJOIN A WILDCAT STRIKE PRESENTS A SUBSTANTIAL QUESTION.

The court of appeals was reluctant to issue a preliminary injunction against respondents. The court stated that "the Supreme Court has not had occasion to address the power of a district court under Section 301 to issue an injunction against a union in connection with a wildcat strike." (App. A.-6a) Nevertheless, the court denied petitioner's application for a preliminary injunction and then applied the precept for an action for damages, *Carbon Fuel*.[3]

The First, Second, Third, Fifth and Seventh Circuits have ruled that federal courts have jurisdiction under Section 301(a) of the Labor Management Relations Act to enjoin a wildcat strike, *International Detective v. International Brotherhood of Teamsters*, 614 F.2 29 (1st Cir. 1980); *Elevator Manufacturers' Association of New York, Inc. v. Local 1*, 689 F.2d 382 (2nd Cir. 1982); *United States Steel Corporation v. United Mine Workers of America*, 534 F.2d 1063 (3rd Cir. 1976); *Philadelphia Newspapers, Inc. v. Newspaper and Magazine Employees Union*, 647 F.Supp 236 (E.D. Pa. 1986) aff'd 808 F.2d 1517 (3rd Cir. 1986); *Jacksonville Maritime Association v. ILA*, 571 F.2d 309 (5th Cir.

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3. Professor Perritt states that "the Supreme Court has addressed the question of damages for a wildcat strike in breach of a no strike clause but has not been presented directly with the wildcat injunction question. The courts of appeals, however, generally have been willing to enjoin wildcat strikes over arbitrable disputes.", H. H. Perritt, Jr., Labor Injunctions, Sections 4.12, Page 154.

1978) and *Old Ben Coal Corporation v. Local Union No. 1487 of United Mine Workers of America*, (7th Cir. 1974).

Whether a federal court has jurisdiction to enjoin a wildcat strike presents a substantial and national question, which this Court has not addressed.

This Court should exercise its power to interpret federal statutes and should review the decision of the court of appeals.

CONCLUSION

The dockworkers union attempted to disavow any responsibility for the work stoppage. Indeed, the respondents argued in the district court that the petitioner sued the wrong parties and submitted to the district court authority for an action for damages and not injunctive relief.

Whether a federal court has jurisdiction under Section 301(a) of the Labor Management Relations Act to enjoin a wildcat strike involves all organized industries in the United States and every United States District Court. This Court should exercise its power to interpret federal statutes for the following reasons:

- This litigation involves an industrial dispute which was subject to a broad grievance and arbitration procedure and a no-strike clause. Instead of following the grievance and arbitration provisions of the contract, the union members resorted to industrial strife by way of picketing and striking. The employer, on the other hand, agreed to participate in grievance and arbitration.

- The union's action was not in accord with the principles enunciated in the *Steelworkers Trilogy, United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574, (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corporation*, 363 U.S. 593 (1960).

- Appellant satisfied all the requirements for a *Boys' Markets* preliminary injunction and was entitled to a preliminary injunction.
- This litigation is not moot.
- The refusal of the lower courts to issue a preliminary injunction was reversible error. The issuance of a preliminary injunction would have advanced the salutary principles encouraging industrial peace by preventing further strikes and picketing pending resolution of the underlying dispute under the arbitration process.

Petitioner urges this Court to summarily reverse the court below and direct the court of appeals to apply the precept enunciated in *Boys Markets*, or in the alternative, to grant petitioner's writ of certiorari.

Respectfully submitted,

/s/ FRANCIS X. SCANLAN

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Dated: October 23, 1990

APPENDIX

Filed July 27, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-5796

PHILADELPHIA MARINE TRADE ASSOCIATION,
Appellant

v.

LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and
JOSEPH HILL, and
WARREN ANDERSON

Appeal from the United States District Court for the District of New Jersey (Camden)
(D.C. Civil No. 89-03279)

Argued April 2, 1990

BEFORE: MANSMANN, SCIRICA, and SEITZ,
Circuit Judges.

(Filed: July 27, 1990)

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

Plaintiff, Philadelphia Marine Trade Association (PMTA), appeals the denial of its application for a preliminary injunction which it sought under section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1988). The defendants are Local 1291, International Longshoremen's Association; its president, Joseph Hill; and its business agent, Warren Anderson. Plaintiff sought to have barred a strike that it alleged was in violation of the "no-strike" clause of the collective bargaining agreement between plaintiff and Local 1291. We have jurisdiction under 28 U.S.C. § 1292(a) (1988).

I.

Plaintiff is a multi-employer bargaining association, which has negotiated collective bargaining agreements with the International Longshoremen's Association, AFL-CIO (ILA), on behalf of its members. Plaintiff and Local 1291, a chartered local of the ILA, entered into a collective bargaining agreement for the term October 1, 1986, to September 30, 1989, which was extended by the parties until November 30, 1990. The contract contains a broad grievance and arbitration clause and a no-strike provision.[1] Defendants do not dispute the existence of

1. The provision of the contract governing arbitration and the prohibition against strikes reads in part:

the agreement or that those clauses are binding on them.[2]

Southern Stevedoring Company (Southern), a subsidiary of Del Monte Tropical Fruit Company and a member of PMTA, entered into an additional memorandum of agreement with Local 1291 covering working conditions at Southern's facilities at Pier 5 in Camden, New Jersey. In accordance with the provisions of this agreement, Southern selected three "house" or regular gangs from the union to perform the stevedoring at Pier 5.

On August 7, 1989, when Southern was scheduled to unload a cargo of perishable fruit, approximately 20 to 25 members of Local 1291 picketed the entrance to the terminal. It is undisputed that they did so because they were unhappy with the process for selecting house gangs. Although the president of Local 1291 asked the picketers to "rescind their pickets," they refused to do so.

Plaintiff then filed this action in the district court, seeking a temporary restraining order enjoining defendants and any individual represented by Local 1291 from violating the no-strike provision of the

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37. GRIEVANCE AND ARBITRATION:

All disputes and grievances of any kind or nature whatsoever arising under the terms and conditions of this Agreement and all questions involving the interpretation of this Agreement other than any disputes or grievances arising under the terms and conditions of paragraph 16 (d) hereof [regarding the number of men in a gang], shall be referred to a Grievance Committee . . . .

. . . .

. . . There shall be no strike and no lockout during the pendency of any dispute or issue while before the Grievance Committee, the Joint Panel or the Arbitrator.

2. The collective bargaining agreement does not contain a "best efforts" provision.

collective bargaining agreement. The complaint also sought submission of the dispute to arbitration. The court issued a TRO without opposition and granted a rule to show cause why a preliminary injunction should not issue. When the picketing continued, the court, on plaintiff's motion, issued a contempt order. Picketing ceased at that time and discharging operations began at approximately 6:30 p.m. on August 7.

The district court conducted a hearing on August 17, 1989, at which one of the picketers testified regarding the reason for the picketing.[3] Thereafter, it found, and plaintiff does not dispute, that the August 7 picketing occurred without the union's formal authorization and therefore constituted a "wildcat" strike. The court further concluded that the union or its officials were not otherwise responsible for the unauthorized picketing. It therefore denied the preliminary injunction. This appeal followed.

II.

Appellate review of a district court's denial of a preliminary injunction is limited to determining whether the court abused its discretion, committed an obvious error in applying the law, or made a clear mistake in considering the proof. *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 799 (3d Cir. 1989). Where, as here, the essential findings of fact are conceded or are undisputed and the district

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3. With the consent of counsel for the parties, James Peoples, one of the picketers, was permitted to testify to the effect that the picketers felt that the gang selection procedure did not treat senior gangs fairly and that if restraints on picketing were removed, another strike would occur regardless of the position of the union or the no-strike provision of the collective bargaining agreement. The case is therefore not moot.

court's decision rests on an interpretation of the law rather than on the facts, our review is broader.[4]

Plaintiff sought a preliminary injunction under section 301 of the Labor-Management Relations Act. The standard for injunctive relief against picketing in a labor dispute was announced by the Supreme Court in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), which held that section 301 authorizes injunctions against strikes in violation of contracts that call for arbitration of the underlying grievances. *Boys Markets* represents an effort to accommodate the prohibition against labor injunctions by federal courts contained in section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1988).[5]

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4. *See* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2962 (1973).

5. Section 4 of the Norris-LaGuardia Act provides in pertinent part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> . . . .
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute: . . . .

29 U.S.C. § 104 (1988).

and the subsequently enacted provisions of section 301(a), 29 U.S.C. § 185(a) (1988),[6] giving the federal courts jurisdiction over suits arising out of collective bargaining agreements.[7]

In *Boys Markets*, the union itself called the strike against which the employer sought and obtained an injunction. The harder case is the one before us where the district court made an explicit finding that the union was not responsible for the picketing. Can an injunction issue against a union to ban wildcat picketing in violation of no-strike, arbitration provisions in the collective bargaining agreement without a finding of union responsibility? We turn to that important question.

The Supreme Court has not had occasion to address the power of a district court under section 301 to issue an injunction against a union in connection with a wildcat strike. It has emphasized, however, that the injunction exception to Norris-LaGuardia that it carved out in *Boys Markets* is a "narrow" one and that it does not follow "that

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6. Section 301(a) of the Labor-Management Relations Act provides:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1988).

7. While section 7(a) of the Norris-LaGuardia Act, 29 U.S.C. § 107(a) (1988), permits injunctions against "unlawful acts," we can find no authority for equating breach of contract with unlawful act. *See* H. H. Perritt, Jr., Labor Injunctions § 3.22 (1986). Indeed, to equate the two would render the accommodation in *Boys Markets* unnecessary.

injunctive relief [is] appropriate as a matter of course in every case of a strike over an arbitrable grievance." *Boys Markets*, 398 U.S. at 253-54. Thus, before we can apply *Boys Markets* to the case before us, we must determine whether plaintiff is entitled to any relief under section 301. That is, we must determine whether the union was responsible for a breach of the collective bargaining agreement.

Section 301(b) states in part that "[a]ny labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents." 29 U.S.C. § 185(b) (1988). Section 301(c), which refers to "duly authorized officers or agents . . . engaged in representing or acting for employee members," suggests that the agents of a labor organization are limited to its officers or to individuals "duly authorized" to act on its behalf. 29 U.S.C. § 185(c) (1988). Therefore, union members *qua* members are not automatically agents of the union for section 301 purposes.

Section 301 (e) further provides:

> For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C. § 185(e) (1988).[8] The Supreme Court has interpreted this provision to be a reflection of

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8. In analyzing the definition of the term "agent" in section 301(e), Senator Taft stated:

> . . . This restores the law of agency as it has been developed at common law.

congressional intent to apply to unions the common-law doctrine of agency.[9]

Given the language of section 301, we conclude that in a wildcat-strike setting, absent formal authorization, the union can only be subject to injunctive relief when the picketing is attributable to it. This brings us to consideration of the possible theories under which a local union may be subject to an injunctive sanction in the context of a wildcat strike.

Three theories have been advanced under which unauthorized picketing by members may be attributed to the union for injunctive purposes. They are (1) the common-law rule of agency, (2) the "mass action" theory, and (3) the "best efforts" theory. The agency rule applies when it is found that the union has instigated, participated in or actively encouraged its members to continue an unauthorized work

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. . . .

. . .[T]he definition applies equally in the responsibility imputed to both employers and labor organizations for the acts of their officers or representatives *in the scope of their employment.*

. . .[U]nion business agents or stewards, *acting in their capacity of union officers*, may make their union guilty of an unfair-labor practice when they engage in conduct made an unfair-labor practice in the bill, even though no formal action has been taken by the union to authorize or approve such conduct.

93 Cong.Rec. 6859 (1947) (remarks of Sen. Taft) (emphasis added).

9. *Carbon Fuel Co. v. UMWA*, 444 U.S. 212 (1979). The Court noted that, in section 301, the common-law agency test has replaced the more restrictive test of union responsibility contained in section 6 of the Norris-LaGuardia Act, which requires "clear proof of *actual* participation in, or *actual* authorization of, such acts, or of ratification of such acts after *actual* knowledge thereof." *Id.* at 217 n.6 (quoting 29 U.S.C. § 106 (1988) (emphasis supplied)). *See also UMWA v. Gibbs*, 383 U.S. 715, 736 (1966).

stoppage. *Eazor Express, Inc. v. International Bhd. of Teamsters*, 520 F.2d 951, 963 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976). The mass action theory places responsibility on the union when essentially all its members engage in a concerted walkout. *Id.* The rationale for this theory is that "large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members." *Id.* The best efforts theory is based on the premise that implicit in a union's agreement not to strike is an obligation on its part to use every reasonable means to bring an end to an unauthorized strike begun by its members. *Id.* at 959. We will address these theories in turn.

COMMON-LAW AGENCY

The district court's jurisdiction to enforce collective bargaining agreements derives exclusively from section 301. In section 301(b) and (e), Congress made it clear that union responsibility was to be governed solely by agency principles. To waive that explicit requirement in the case of injunctive relief would, we think, result in "pierc[ing] the shield that Congress took such care to construct." *Carbon Fuel v. UMWA*, 444 U.S. 212, 218 (1979). Indeed, it would impermissibly expand the scope of the narrow exception to Norris-LaGuardia's anti-injunction provisions created in *Boys Markets*.

Plaintiff argues that *Carbon Fuel*, which determined that a union can be held liable in damages on an agency theory only, applies only in an action for damages and that because it seeks injunctive relief, we must apply this court's holding in *United States Steel Corp. v. UMWA*, 534 F.2d 1063 (3d Cir. 1976).[10]

10. The court upheld the propriety of a *Boys Markets* injunction, prospectively enforcing an implied no-strike agreement, against wildcat work stoppages in which essentially all members of the union participated and the union leadership exerted minimal effort to get the striking members back to work.

We think that case does not dispense with the agency requirement. Rather, it was concerned with the sufficiency of the evidence.

We hold, therefore, that as a precondition to injunctive relief against a union under *Boys Markets*, a plaintiff must prove agency as required by section 301(b) and (e). *Accord Hardline Elec., Inc. v. International Bhd. of Elec. Workers, Local 1547*, 680 F.2d 622, 626 n.4 (9th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

The district court found that the union did not instigate, support, ratify or encourage the strike. Plaintiff does not contend that these findings are clearly erroneous or legally incorrect. Thus, plaintiff was not entitled to an injunction against the union under common-law agency principles.

MASS ACTION

The district court found that there was no mass action and plaintiff does not attack that finding on appeal. Thus, we have no occasion to consider whether it constitutes a legal basis, apart from agency, for finding a union responsible or is only *prima facie* proof of agency under section 301.[11]

BEST EFFORTS

Although it is by no means clear, plaintiff seems to argue that the union officials did not use their best efforts to terminate the picketing. The district court noted that the best efforts theory of union responsibility for the unauthorized actions of its members is no longer a separate, viable theory to support injunctive relief in view of *Carbon Fuel. Philadelphia Marine Trade Assoc. v. Local 1291*,

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11. For a thoughtful exposition of the role of the mass action theory in establishing agency, *see* Cureton and Kisch, *Union Liability for Illegal Strikes: The Mass Action Theory Redefined*, 87 W.Va.L.Rev. 57 (1984).

International Longshoremen's Assoc., No. 89-3279, slip op. at 11 (D. N. J. Sept. 25, 1989). Thus, the district court did not make a best efforts finding. We are therefore required to pass on the correctness of the district court's ruling because, if the theory is viable, a remand for a factual finding would be in order.

We need not elaborate on the viability of best efforts as an independent theory of union responsibility because this court has held that it did not survive the Supreme Court's decision in *Carbon Fuel*. *See Pittsburgh-Des Moines Steel Co. v. United Steelworkers*, 633 F.2d 302, 307 (3d Cir. 1980). Whether best efforts is still cognizable to rebut an agency inference based on proof of mass action, is thus a matter for another day.

Because plaintiff failed to establish union responsibility for the picketing, we conclude that *Boys Markets* does not apply. As the Supreme Court dictated, "A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act." *Boys Markets*, 398 U.S. at 254. Because we find that *Boys Markets* does not apply, we have no occasion to address whether there is an arbitrable issue here or whether the principles of equity have been satisfied.

Accordingly, the order of the district court denying plaintiff's application for a preliminary injunction will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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United States Court of Appeals
FOR THE THIRD CIRCUIT

No. 89-5796

PHILADELPHIA MARINE TRADE ASSOCIATION,
Appellant

vs.

LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and JOSEPH HILL and WARREN ANDERSON

(D.C. Civil No. 89-03279)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE —— DISTRICT OF NEW JERSEY
(Camden)

Present: MANSMANN, SCIRICA and SEITZ, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the —— District of New Jersey (Camden) and was argued by counsel April 2, 1990.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered September 25, 1989, be, and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

Sally Mvros

Clerk

Certified as a true copy and issued in lieu of a formal mandate on August 20, 1990

Test: M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

July 27, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PHILADELPHIA MARINE TRADE ASSOCIATION,	:	Civil Action 89-3279
Plaintiff,	:	OPINION
V.	:	
LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,	:	
Defendant.	:	

APPEARANCES:

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RODRIGUEZ, District Judge

This matter is before the court on an application for a preliminary injunction by plaintiff Philadelphia Marine Trade Association (PMTA). Plaintiff seeks to preliminarily enjoin defendants Local 1291, International Longshoremen's Association, its president Joseph Hill, and its business agent Warren Anderson, for strikes occurring at Southern Stevedoring Company in violation of the "no-strike" clause of the collective-bargaining agreement between PMTA and Local 1291. On August 17, 1989, a hearing was held on the application for a preliminary injunction.

I. FINDINGS OF FACT

This action arises out of a contract between PMTA and Local 1291 which contains a broad grievance and arbitration clause and a no-strike provision. Testimony of Kelly; Exhibit A to the Complaint at 47-50. Defendants did not dispute the existence of the contract or that the above noted clauses are binding on the parties.

Southern Stevedoring Company, a subsidiary of Del Monte Tropical Fruit Company, has been a member of the PMTA for approximately 17 years and originally operated in Wilmington, Delaware. Southern Stevedoring and Local 1291 entered into an additional memorandum of agreement which clarified the working conditions at Southern Stevedoring's facility located at Pier 5 in Camden, New Jersey. Exhibit B to the Complaint. On August 2, 1989, there was a meeting between the PMTA and Local 1291. The purpose of the August 2, 1989 meeting with the PMTA and Local 1291 was to announce Del Monte Tropical Fruit's selection of house gangs for unloading cargo from the ship the M/V Argentinean Reefer. Present at this meeting was defendant Warren Anderson. Anderson thought that the selection of house gangs was unfair and that some gangs had not been provided with sufficient time to prove themselves at Del Monte. Anderson suggested that the most senior gangs be selected. Testimony of Jeffrey Gillespie. Southern Stevedoring Company announced its selection of three house gangs which did not include all of the most senior gangs. A gang ordinarily consists of nineteen men plus a foreman.

On the morning of August 7, 1989, at approximately 7:30 a.m., 20 to 25 pickets appeared at Southern Stevedoring's facility at Pier 5 in Camden, blocking the entrance to the terminal. These men were wearing signs that stated "9 years is enough," "first in, first out," "Del Monte is unfair." At 8:00 a.m. on August 7, 1989, the M/V Argentinean Reefer was scheduled to unload perishable, refrigerated fruit, primarily pineapples and bananas. Two gangs had been ordered to an 8:00 a.m. start. Testimony of Jeffrey Gillespie; Testimony of Thomas Hessian. Discharging operations scheduled for 8:00 a.m. were not able to

begin. At approximately 11:00 a.m. that day, plaintiff filed this complaint and an application for a temporary restraining order as a result of picketing at Southern Stevedoring Company. This court granted plaintiff's motion for a temporary restraining order, issued an order to show cause why a preliminary injunction should not issue, and restrained Local 1291, any individual represented by them, Joseph Hill and Warren Anderson from picketing at Southern Stevedoring Company's facility at Pier 5, Camden, New Jersey, and from violating the "no-strike" provision of the collective bargaining agreement. At approximately 12:00 noon, an agent of the PMTA served individuals at Southern Stevedoring Company, with copies of the temporary restraining order and the order to show cause why a preliminary injunction should not issue. The individuals continued to picket after service of these papers. At approximately 5:00 p.m. that evening, the court entered an order to show cause why individuals picketing at Southern Stevedoring should not be held in contempt. No individuals were arrested pursuant to the consent order because the Federal Marshal determined that there was substantial compliance with the court order. Discharging operations eventually began at approximately 6:30 p.m.

Del Monte Tropical Fruit is in the business of importing tropical fruit. Del Monte adheres to a strict vessel schedule. On Mondays, Tuesdays, and Wednesdays vessels unload at Southern Stevedoring, and on Wednesday at approximately 5:00 p.m., vessels sail from Camden to Costa Rica arriving on Monday morning. In Costa Rica, the vessel will load and set sail on Tuesday arriving in Camden early Monday morning. Pineapples and bananas have a shelf life of fourteen days. Fruit arriving at Pier 5 will have been on board for four days. Many supermarkets and other retailers depend on timely delivery and have trucks waiting at Pier 5 to receive the fruit. Testimony of Kevin Horvath.

Present in the courtroom during the hearing were various members of Local 1291. Jeffrey Gillespie identified three of these spectators, James Peoples, N. Henry and a third individual, as some of the men he saw blocking the terminal entrance.

Gillespie also identified an F. Bruzek as a picketer. Bruzek was not present at the hearing.

Peoples requested an opportunity to testify at the hearing. With consent of counsel for the parties, the court permitted Peoples to testify regarding the activity at Southern Stevedoring on August 7, 1989. Peoples' testimony indicated that the picketers were not pleased with Del Monte's choice of gangs for unloading the M/V Argentinean Reefer. Peoples vehemently asserted that Del Monte did not treat senior gangs fairly and that if the court removed restraints on picketing at Southern Stevedoring, another strike would occur. Peoples admitted that he participated in the August 7th strike, and that it occurred because of the unfair treatment regarding choice of gangs over the past nine years. His testimony, "do it right or you're going to have a strike," clearly showed that the strike occurred without authorization of Local 1291, and the picketers' disregard for the no-strike clause in the collective-bargaining agreement or the actions taken by the union. Only a court order enjoining a strike would be honored by these particular members of Local 1291.

In light of the above, this court finds that the picket line of August 7, 1989 occurred without authorization of defendants Local 1291, Hill or Anderson. The actions taken by these 20 to 25 individuals constitute a "wildcat" strike. The issue before the court, therefore, is whether a preliminary injunction should issue against the union or its officers for an unauthorized "wildcat" strike.

II. ARGUMENTS

Plaintiff seeks to enjoin the union and its officers from violating the no-strike provision of the contract. Essentially, plaintiff asks the court to issue an injunction against defendants for the unauthorized actions of some of their members because (1) defendants are directly responsible for these actions[1] and (2)

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1. This court's factual determination that this action is a "wildcat" strike defeats plaintiff's first argument.

a union can be held responsible for the unauthorized actions of its members.[2]

Defendants contend that this court should not grant a preliminary injunction because the picketing of August 7, 1989 occurred "without the sanction of the union and without participation by Local 1291 or its officers in the picketing." Defendants also contend that the plaintiff has sued the wrong parties and suggests that plaintiff's application for a preliminary injunction should be against the individual picketers rather than the union or its officers.

III. STANDARD FOR PRELIMINARY INJUNCTION

The Third Circuit in *Ecri v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987) enumerated the standard for preliminary injunctive relief:

> [T]he party seeking a preliminary injunction bears the burden of producing evidence sufficient to convince the court that (1) the movant has shown a reasonable probability of success on the merits; (2) the movant will be irreparably injured by the denial of relief; (3) granting preliminary injunctive relief will not result in an even greater harm to the other party; and (4) granting preliminary relief will be in the public interest.

Failure to bear the burden on a single element of the four-part test will result in a denial of the preliminary injunction. *Id.*

IV. CONCLUSION OF LAW

Section 4 of the Norris-LaGuardia Act limits the jurisdiction of a federal court to enjoin a strike arising out of a labor dispute. 29 U.S.C. §104. Section 301(a) of the Labor Management Relations Act, however, conveys jurisdiction upon a federal

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2. For support, plaintiff relies on the Third Circuit decision in *United States Steel Corporation v. United Mineworkers of America*, 534 F.2d 1063 (3d Cir. 1976), where the court considered an appeal from an order granting a *Boys Market* injunction, prospectively enforcing an implied no-strike undertaking in a collective-bargaining agreement.

court to enforce no-strike provisions of collective-bargaining agreements. The Supreme Court in *Boys Market Inc. v. Retail Clerks Union Local 770,* 398 U.S. 235 (1970) created a narrow exception to the anti-injunction provisions of the Norris-LaGuardia Act in favor of the policies embodied in the Labor Management Relations Act. A federal court may enjoin a strike arising out of a labor dispute if:

> (1) the strike was in breach of a no-strike obligation under the effective bargaining agreement;
>
> (2) the parties are contractually bound to arbitrate the grievance; and
>
> (3) the injunction is otherwise warranted under principles of equity jurisprudence.

Philadelphia Newspapers, Inc. v. Newspaper & Magazine Employees Union, 647 F. Supp. 236, 239 (E.D. Pa. 1986) (citing *Boys Market,* 398 U.S. at 253)).

The *Boys Market* exception to the anti-injunction provisions applies only to arbitrable issues, 647 F. Supp. at 239 (citing *Buffalo Forge Co. v. United Steelworkers of America,* 428 U.S. 397 (1976)), and there is a strong presumption in favor of arbitrability, especially where there exists a broad arbitration clause. 647 F. Supp. at 239; *see United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 584-85 (1960). As indicated earlier, this matter involves a binding no-strike provision and a broad grievance and arbitration clause.

The three recognized theories for holding a union responsible for the illegal actions of its members are (1) the "best efforts" theory, (2) the "mass action" theory, and (3) the common law rule of agency. Under the best efforts theory a union has a continuing duty to exercise ever reasonable effort to prevent or terminate an unauthorized strike. *Eazor Express, Inc. v. International Brotherhood of Teamsters,* 520 F.2d 951 (3d Cir. 1975). The mass action theory charges the union with responsibility when a large number of its members act in concert to precipitate an unauthorized strike. *United States Steel Corp. v. United Mine Workers of America,* 534 F.2d 1063, 1073 (3d Cir. 1976)

(citing *Eazor Express*, 520 F.2d at 964). "The premise [of this theory] is that large groups do not act collectively in the absence of leadership and that a functioning union must be held responsible for the mass action of its members." *Consolidated Coal Co. v. United Mineworkers of America*, 725 F.2d 1258, 1261 (10th Cir. 1984). Courts have split on the issue of whether these two theories survived the Supreme Court's decision in *Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212 (1979), which determined that a union can be held liable in damages on a common law theory of agency only.

In *Carbon Fuel*, the Supreme Court determined that an international union, which neither instigates, supports, ratifies nor encourages wildcat strikes engaged in by local unions in violation of a collective-bargaining agreement, may not be held liable in damages to an affected employer because the union did not use all reasonable means available to prevent strikes or bring about their termination.[3] *Id.* at 213-16. The local unions had engaged in forty-eight unauthorized strikes in violation of the collective bargaining agreement, and efforts of the regional subdivision of the international union to persuade the local unions not to strike and to return to work were unsuccessful. *Id.* at 213-14.

The Court reviewed the legislative history of section 301 of the Labor Management Relations Act and determined that "the legislative history is clear that "Congress limited the responsibility of *unions* for strikes in breach of contract to cases when the *union* may be found responsible according to the common-law rule of agency." *Id.* at 216 (emphasis added).

The distinction between *Carbon Fuel* and the case at bar is that *Carbon Fuel* dealt with liability in damages for the international union for the actions of local unions, whereas the present case deals with responsibility of local unions for the acts of its members. Courts have found that local unions have a

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3. The Supreme Court granted certiorari to resolve a conflict between the Fourth Circuit in *Carbon Fuel Co. v. United Mine Workers*, 582 F.2d 1346 (4th Cir. 1978) and the Third Circuit in *Eazor Express*, 520 F.2d at 951. *United States Steel Corp.*, which plaintiff relies upon in this action, is based on the reasoning of *Eazor Express*. *See* 534 F.2d at 1063.

stronger and closer relationship with their members than that between international unions and their local unions. Consequently, the local union should be more accountable for failing to control illegal conduct of its members. *See, e.g., Consolidated Coal Co. v. Local 2216, United Mine Workers of America,* 779 F.2d 1274, 1276 (7th Cir. 1985). However, as the Tenth Circuit noted in *Consolidated Coal,* "the [Supreme] Court fashioned a rule of liability without differentiating among local, district or international unions [a]nd no such distinction is made in the statutory language or in the legislative history relied on by the Court." 725 F.2d at 1263. Therefore, the Tenth Circuit found that *Carbon Fuel* applies to local unions as well as international unions. *Id.* This court agrees with the reasoning of the Tenth Circuit and rejects the argument that *Carbon Fuel* does not apply to local unions regarding unauthorized strikes by their members. *Accord Consolidated Coal,* 725 F.2d at 1263; *C & K Coal Co. v. United Mine Workers of America,* 537 F. Supp. 480, 488 (W.D. Pa. 1982); *Airco Speer Carbon-Graphite v. Local 502, International Union of Electrical, Radio and Machine Workers of America,* 494 F. Supp. 872, 874-76 (W.D. Pa. 1980).

Plaintiff also asserts that *Carbon Fuel* and its progeny apply only in damage actions against unions, and because this action seeks purely injunctive relief, the court should apply the Third Circuit case of *United States Steel Corp.,* 534 F.2d at 1063. The court rejects this argument because *United States Steel Corp.* merely applies the best efforts and mass action theories of union responsibility in an action seeking injunctive relief.[4]

The court, therefore, concludes that the local union cannot be enjoined from breaking the collective-bargaining agreement under the best efforts theory for the unauthorized and illegal strikes of its members because the "best efforts" theory of union responsibility for the unauthorized actions of its members is no longer a viable theory due to the Supreme Court decision in

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4. The court notes that enjoining a union could lead to a result similar to imposing damages on the union for illegal strikes by its members. A civil contempt action for the violation of the injunction could result in making the union pay penalties for the illegal actions of its members.

Carbon Fuel. See, e.g., Consolidated Coal, 725 F.2d at 1263; *Airco Speer Carbon-Graphite v. Local 502, International Union of Electrical, Radio and Machine Workers of America*, 494 F. Supp. 872, 875 (W.D. Pa. 1980).

The next question before the court is whether the mass action theory of liability survived the *Carbon Fuel* decision, and if so, whether plaintiff satisfied its burden of showing a reasonable likelihood of success under this theory of liability. The court need not decide whether the mass action theory survived *Carbon Fuel* because it finds that plaintiff has not met its burden of showing a reasonable likelihood of success on the merits under the mass action theory if in fact it remains viable.[5]

In this case, it is clear that only 20 to 25 picketers were present at Southern Stevedoring Company on August 7, 1989 in violation of the no-strike clause in the collective-bargaining agreement. Although it is unclear exactly how many individuals are members of the defendant Local 1291, it is clear that three gangs were chosen to unload the fruit from the ship, that these gangs originally consisted of nineteen men plus a foreman, and that these men were union members. Therefore, only twenty-five members of Local 1291, which consists of at least eighty-five members (the three gangs chosen with twenty union members plus the twenty-five picketers), violated the collective-bargaining agreement. Accordingly, the mass action theory of *United States Steel Corp.* for union responsibility for a wildcat strike cannot be established where less than thirty percent of the union members participate in the unauthorized strike.

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5. It appears that *Carbon Fuel* would preclude an action based on the mass action theory because of the broad language of the Court regarding the "liability of unions" under section 301. *Carbon Fuel*, 444 U.S. at 216.

However, it is not clear whether the Court decided that local unions, with their close relationship to their members, should be shielded from liability when the actions of *all* of its members violate the collective-bargaining agreement. In that circumstance, the mass action theory represents a sensible and pragmatic approach to protecting an affected party from strikes when the union denies all responsibility for the action but has "turned its back" on the illegal conduct and allowed the actions to take place. *See Consolidated Coal Co. v. Local 1702 United Mine Workers of America*, 709 F.2d 882, 885 (4th Cir. 1983).

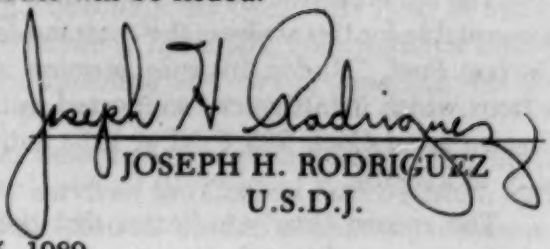
The only remaining theory on which defendants can be held accountable for this strike is the common-law theory of agency in *Carbon Fuel*. "Under this rule, a union is liable only for those actions which it instigated, supported, ratified or encouraged." *Consolidated Coal*, 725 F.2d at 1263 (citing *Carbon Fuel*, 444 U.S. at 216-18).

The record clearly indicates that the union has not instigated, supported, ratified, or encouraged this strike. Union officials immediately appeared at Southern Stevedoring the morning of the incident. Local 1291 president defendant Hill informed the picketers that their actions breached the collective-bargaining agreement no-strike provision and that they should terminate their activities. Also, defendants did not oppose a temporary restraining order seeking to restrain those individuals from picketing at Southern Stevedoring in violation of the contract. Defendants, in fact, argue here that restraints are appropriate against the specific individuals who violated the no-strike provision, but that the union or its officials should not be enjoined for the unauthorized acts of a portion of its membership. In addition, the testimony of James Peoples, a member of Local 1291 who admitted that he picketed at Southern Stevedoring, indicated that the picketers felt that they were treated unfairly because of the method of choosing gangs, and that if the court did not continue restraints or Del Monte did not "do it right," another strike would occur regardless of the position of the union or the no-strike provision.

There is no evidence to suggest that the union instigated, supported, ratified, or encouraged the actions of the picketers. As a result, plaintiff has not met its burden of showing a reasonable likelihood of success on the merits on the common-law theory of agency.

Plaintiff has failed to satisfy its burden of showing a reasonable likelihood of success on the merits with regard to any of the above noted theories for holding a union or its officials responsible for an unauthorized strike of its members. Accordingly, the application for preliminary injunctive relief will be denied.

An appropriate order will be issued.



JOSEPH H. RODRIGUEZ
U.S.D.J.

Dated: September 25, 1989

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PHILADELPHIA MARINE TRADE ASSOCIATION,	:	Hon. Joseph H. Rodriguez
Plaintiff,	:	Civil Action 89-3279
V.	:	**ORDER**
LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,	:	
Defendant.	:	

For the reasons set forth in this court's opinion filed even date;

IT IS on this 25th day of September, 1989 ORDERED that plaintiff's application for a preliminary injunction is hereby *DENIED.*

Joseph H. Rodriguez

JOSEPH H. RODRIGUEZ
U.S.D.J.

on 9-25-90
WILLIAM T. WALSH, CLERK

By. J. Flood
(Deputy Clerk)

No. 90 - 669

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PHILADELPHIA MARINE TRADE ASSOCIATION,
Petitioner,

v.

LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

AND SUPPLEMENTAL APPENDIX

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly hold that a federal court may not issue an injunction against a union or its officers to enjoin "wild cat picketing" during the life of a collective bargaining agreement containing a no-strike--arbitration provision, absent a finding of union responsibility for the picketing?

2. Did the Court of Appeals correctly hold that the question of union responsibility for breach of a collective bargaining agreement under Section 301 of the Labor-Management Relations Act is to be governed solely by agency principles?

THE PARTIES

The parties to this case are as follows;

Petitioner: The Philadelphia Marine Trade Association ("PMTA")

Respondents: Local 1291, International Longshoremen's Association; Joseph Hill, President of Local 1291, International Longshoremen's Association; and Warren Anderson, a Business Agent of Local 1291, International Longshoremen's Association. Respondents are referred to collectively as the "Union".

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RESPONDENTS' BRIEF IN OPPOSITION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This case arises out of "wild cat picketing" by approximately 25 members of the respondent local Union. The picketing arose out of the unhappiness of these members as a result of an agreement reached between the Union and PMTA over the process for selecting longshore gangs to be the regular "house" gangs for a particular Employer-member of PMTA. The lower courts agreed that a preliminary injunction could not issue against the Union

since PMTA had failed to establish Union responsibility for the picketing under common-law agency principles.[1]

Petitioner PMTA maintains that under the *"Boys Market"* exception to the Norris-LaGuardia Act, an injunction may issue against the Union and its officers even when it is conclusively established that neither the Union nor its officers bears any responsibility for the picketing. This Court has never so held. Nor has any Court of Appeals rendered such a holding subsequent to this Court's decision in *Carbon Fuel Co. v. United Mineworkers of America*, 444 U.S. 212 (1979).

The Court of Appeals correctly applied well-settled law to the facts of this case and correctly affirmed the District Court's denial of a preliminary injunction. Accordingly, the Union respectfully requests that the Court deny the *Petition*.[2]

OPINIONS BELOW

The District Court's Opinion is not reported and is reproduced as Appendix C to the *Petition* (App C at 14a-24a). The Opinion of the Court of Appeals (Seitz, Circuit Judge) is reported at 909 F. 2d 754 (3rd Cir. 1990) and is reproduced as Appendix A to the *Petition* (App. A at 1a-12a).

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1. The Lower Courts did not find it necessary to reach the questions of whether there was an underlying arbitrable dispute or whether the principles of equity mandated by Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107, had been satisfied. The Union had pressed these defenses in the courts below.

2. The "Introduction" to the *Petition* claims that "Chaos and industrial strife will occur not only in the maritime industry but in many other industries unless this Court grants review of this case." Nothing in the record supports this bald proposition.

STATUTES INVOLVED

The relevant statutes, which are set forth verbatim in the Appendix hereto, are as follows:

1. Sections 301 (a), (b), (c) and (e) of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. §§ 185 (a), (b), (c) and (e).

2. Sections 4 and 7 (a) of the Norris-LaGuardia Act, 29 U.S.C. §§ 104 and 107 (a).

STATEMENT OF THE CASE

The Statement of Case presented by PMTA in the *Petition* contains a significant mis-statement while omitting certain facts which are vital to an understanding of this case.

The Union and its members did not refuse to work the vessel in question on August 7, 1989 and the District Court did not so find. Instead, the District Court found that on the morning of August 7, 1989 at approximately 7:30 A.M., 20 to 25 pickets blocked the entrance to the Southern Stevedoring facility in Camden, N.J. in protest of the method agreed upon by PMTA and the Union for selection of Southern Stevedoring's house gangs.

The District Court expressly found that the Union neither instigated, supported, ratified nor encouraged this picketing and that the picket line "occurred without authorization of defendants Local 1291, Hill or Anderson". (App. C to *Petition* at C-17a and C-23A) Accordingly, the District Court concluded that the pick-

eting constituted an *unauthorized* "wildcat" strike.[1]

These findings by the District Court were not challenged as "clearly erroneous" by PMTA on its appeal to the Third Circuit.

The District Court held that in order for a preliminary injunction to issue, PMTA had to satisfy its burden "of showing a reasonable likelihood of success on the merits on the common-law theory of agency." Since there was no evidence indicating that the Union had instigated, supported, ratified or encouraged the action of the picketers, the District Court concluded that PMTA had failed to satisfy its burden of showing a reasonable likelihood of success on the merits with respect to establishing responsibility on the part of the Union and its officers for the unauthorized strike of certain of its members.

The Court of Appeals affirmed, noting that "the injunction exception to Norris-LaGuardia" established by this Court in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) is a "narrow" one and that before *Boys' Markets* can be applied, there must be a threshold determination as to whether the plaintiff employer is entitled to any relief under Section 301 of the LMRA - "That is, we must determine whether the Union was responsible for a breach of the collective bargaining agreement." (App. A of *Petition* at A-6a and A-7a)

Relying on this Court's decision in *Carbon Fuel v. United Mineworkers of America*, 444 U.S. 212 (1979) the Court of Appeals held that Union responsibility under Section 301 is to be "governed solely by agency principles" and that "as a precondition to injunctive relief against the Union under *Boys' Markets*, a plaintiff must prove agency as required by Section 301 (b) and

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1. The District Court also found that Local 1291's President, Joseph Hill, made efforts to persuade the picketers to terminate their activity. In addition, the District Court concluded that the picketing activity of 20 to 25 persons did not constitute "mass action."

(e)." Since the District Court had found that the Union did not instigate, support, ratify or encourage the strike and PMTA had not contended that these findings were clearly erroneous or legally incorrect, the Court of Appeals affirmed the decision of the District Court that PMTA was not entitled to the issuance of a preliminary injunction.[4]

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *BOYS' MARKETS* OR ANY OTHER CASE.

PMTA implies that this Court's holding in *Boys' Markets v. Retail Clerks Local Union 770*, 398 U.S. 235 (1970) permits the issuance of an injunction against a Union and its officers in connection with a strike or picketing, regardless of whether there is a finding of Union responsibility for such strike or picketing. Nothing in *Boys' Markets* so holds. On the contrary, this Court clearly indicated that before an injunction can issue under *Boys' Markets*, there must be consideration of whether, *inter alia*, a breach of the collective bargaining agreement is occurring and continues. (398 U.S. at 254).

Clearly, before any injunction can issue against a labor organization and its officers under the exception to Norris-LaGuardia carved out by *Boys' Markets*, a District Court must consider whether the labor organization and its officers are in fact

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4. The Court of Appeals found that it was not necessary to address certain other defenses raised by the Union including the question of whether there was an underlying arbitrable issue or whether principles of equity had been satisfied. Moreover, the Court of Appeals concluded that since the District Court had found that there was no mass action, it was not necessary to consider whether mass action constituted a legal basis, apart from agency, for finding a Union responsible for "wildcat picketing."

responsible for such breach. Nowhere in *Boys' Markets* is there any suggestion that an injunction can issue against a labor organization and its officers when there is absolutely no evidence that they bear any responsibility for the strike or picketing in question.

In *Carbon Fuel v. United Mineworkers of America*, 444 U.S. 212 (1979) this Court left no doubt that questions involving legal responsibilities of a labor organization and its officers for actions of its members are to be governed by the common law of agency.

Thus, as PMTA notes in its *Petition*, this Court held in *Carbon Fuel*:

"The legislative history is clear that Congress limited the responsibility of Unions for strikes and breach of contract to cases when the Union may be found responsible according to the common-law rule of agency." (444 U.S. at 216)

Accordingly, the action of the District Court and Court of Appeals in concluding that in a wild-cat strike setting, a Union can only be subject to injunctive relief when the picketing is attributable to it under common-law principles of agency, is clearly in line with well-established principles of labor law adopted by this Court.

II. THE HOLDING OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER UNITED STATES COURT OF APPEALS.

Point II of PMTA's *Petition* erroneously states that "there is a conflict in the circuits whether a District Court has jurisdiction to enjoin a wildcat strike". The question in this case does not involve "jurisdiction." What is involved here is the power of a federal court to issue an injunction against a labor organization and its officers under the *Boys' Markets* exception to the anti-injunction provisions of Norris-LaGuardia under circumstances where there is "wildcat" picketing for which the Union bears no responsibility under common-law rules of agency. None of the

cases cited by PMTA involving circuits other than the Third Circuit addressed themselves to this issue.[5] However, at least two other Circuits are in accord with the decision of the Third Circuit below. See *Hardline Electric, Inc. v. IBEW, Local 1543*, 680 F. 2d 622 (9th Cir. 1982), *cert. den'd.*, 459 U.S. 1079 (1983), and *Consolidated Coal Company v. United Mineworkers of America, Local 1261*, 725 F. 2d 1258 (10th Cir. 1984).[6]

III. THIS CASE DOES NOT INVOLVE SUBSTANTIAL QUESTIONS REQUIRING CONSIDERATION BY THIS COURT.

Contrary to PMTA's position, this case does not involve the authority of a federal court to enjoin a wildcat strike. What this case involves is the power of a federal court to issue an injunction against a labor organization and its officers in connection with a "wildcat strike" or "wildcat" picketing when there is no evidence of union responsibility for this wildcat activity under common-law rules of agency - the standard under which federal courts are authorized to impose liability against labor organizations under

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5. See *International Detective v. International Brotherhood of Teamsters*, 614 F.2d 29 (1st Cir. 1980), *Elevator Manufacturers' Association of New York, Inc. v. Local 1*, 689 F.2d 382 (2nd Cir. 1982), *Jacksonville Maritime Association v. ILA*, 571 F.2d 309 (5th Cir. 1978), and *Old Ben Coal Corp. v. Local Union No. 1487 of United Mineworkers of America*, 500 F.2d 950 (7th Cir. 1974).

6. The 10th Circuit in *Consolidated Coal Company* affirmed the action of the District Court of Utah in rejecting the employer's request for an injunction. The District Court reasoned:

> Plaintiff further asks that defendant be enjoined from authorizing or participating in illegal work stoppages in violation of the collective bargaining agreement. Since this Court has concluded that defendant has not instigated, authorized or condoned the work stoppages engaged in by individual union members, there is no union activity subject to injunction. . . . (500 F.Supp. 72, 77 (D. Utah, 1980)).

Section 301 of the LMRA, 29 U.S.C. Sec. 185. Since this Court's decision in *Carbon Fuel* there have been no decisions of federal courts, of which we are aware, which have attempted to impose liability of any sort - whether it be injunctive or for damages - against a labor organization or its accused officers without first giving consideration to the question of whether they bear any responsibility for the conduct in question under common-law principles of agency.

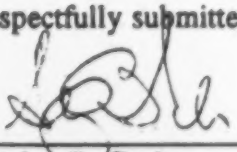
This case involves an uncontroverted finding that the defendant labor organization and officers bore no responsibility for the picketing in question under well-established common-law agency principles. Accordingly, it is clearly not a case which warrants consideration by this Court as one involving a substantial question of national labor policy.

CONCLUSION

Contrary to the Conclusion of PMTA that "The dockworkers union *attempted* to disavow any responsibility for the work stoppage", both the District Court and Court of Appeals found as a matter of fact and law that the respondent Union and its officers *did not* bear any responsibility for the picketing of 20 to 25 individuals. PMTA did not challenge these findings in either of the Courts below.

Accordingly, this case represents nothing more than a decision that an injunction may not issue against a labor organization and its officers absent a finding of responsibility for the picketing in question. Since such a holding does not conflict with decisions of this Court and is not in conflict with decisions of other Courts of Appeals, it is respectfully submitted that the *Petition* for Certiorari should be denied.

Respectfully submitted,



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SUPPLEMENTAL APPENDIX

1. **Labor Management Relations Act of 1947 ("LMRA") Secs. 301 (a), (b), (c) and (e), 29 U.S.C. Secs. 185 (a), (b), (c) and (e)**

Sec. 185 Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any6 employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district curt of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have

jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

2. **Norris-LaGuardia Act, Secs. 4 and 7 (a), 29 U.S.C. Secs. 104 and 107 (a)**

Sec. 104 Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or

other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Sec. 107 Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(3)

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Respondents have ignored the single and critical issue in this case which is the responsibility of a union which agreed to be bound by a no-strike clause in its collective bargaining agreement.

Respondents' statement of the case is incomplete and misleading. The respondents suggest that the dockworkers union and its members did not refuse to work the M/V Argentinean Reefer on August 7, 1989. It is undisputed that the Southern Stevedoring Company's operations ceased because of

the union members picketing during the period 0730-1830 hours on August 7, 1989. Moreover, the dockworkers union did not challenge the findings of the lower courts that James Peoples, a member of the respondent union, who testified at the preliminary injunction hearing on August 17, 1989, that if the district court removed restraints on picketing another strike would occur at the Southern Stevedoring Company.[1]

ARGUMENT

I.

THE DECISIONS OF THE COURTS BELOW IN THIS CASE ARE IN CONFLICT WITH THIS COURT'S RULING IN BOYS MARKETS

In the district court, the dockworkers union argued that the petitioner sued the wrong parties and submitted to the district court authority for damages and not injunctive relief. Petitioner and Southern Stevedoring Company sought only injunctive relief. In respondents' brief the dockworkers union is urging this Court to apply the wrong legal precept. Respondents do not dispute that the collective bargaining agreement contained a broad grievance and arbitration and no-strike clause, which stated "there shall be no strike". Nor do respondents attempt to refute that the petitioner and Southern Stevedoring Company were willing to participate in grievance and arbitration proceedings regarding the selection of the three house gangs.

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1. Footnote Number One in the Respondents' Brief is incomplete, Respondents Brief, page two. That footnote states "The Lower Courts did not find it necessary to reach the questions of whether there was an underlying arbitable dispute or whether the principles of equity" were satisfied. The respondents did not file an Answer to the Complaint. In the district court, the respondents argued that the petitioner sued the wrong parties and submitted to the district court authority for damages and not injunctive relief. The decision of the court of appeals stated "we have no occasion to address whether there is an arbitable issue here or whether the principals of equity have been satisfied." (App, A-11a). These issues were not decided by the district court. Erroneously, the district court applied the precept for damages and not injunctive relief.

Respondents misapplied *Boys Markets.* In their brief, the respondents argued "Clearly, before an injunction can issue against a labor organization and its officers under the exception to Norris-LaGuardia carved out by *Boys' Markets,* a District Court must consider whether the labor organization and its officers are in fact responsible for such breach." The respondents also argue that "a union can only be subject to injunctive relief when the picketing is attributable to it under common-law principles of agency," (Respondents Brief pages 5-6). This Court should reject the respondents' arguments for the following reasons:

First, in *Boys Markets,* this Court established the precept for injunctive relief. The Court in *Boys Markets* did not rule that a district court had to find that the moving party must establish agency. In *Boys Markets,* the analysis is whether there is an arbitable dispute. Whatever prompted Local 1291 not to submit the dispute concerning the selection of house gangs to grievance and arbitration was a decision made by the union. The selection of the house gangs was a dispute which the union could have taken to grievance and arbitration. The fact that the union decided not to grieve or arbitrate the issue does not modify the petitioner's entitlement to a *Boys Markets* injunction.

Second, the Norris-LaGuardia Act does not restrict the district courts on the issuance of a preliminary injunction. Indeed Professors Wright, Miller and Cooper state:

> The federal court, either in an original action or on removal, may enjoin a strike in breach of such an agreement containing binding arbitration provisions, despite the limitations the Norris-LaGuardia Act otherwise puts on injunctions against strikes.[35] (Footnote 35 cites *Boys Markets,* 9 Duq L. Rev 328; 39 Fordham L. Rev 143; 22 S.C.L. Rev 849; 1971, 71 Col. L. Rev 336)
>
> Wright, Miller & Cooper Federal Practice and Procedure Jurisdiction 2d § 3581 (1984), page 294

Third, respondents misread *Carbon Fuel v. United Mine Workers of America,* 444 U.S. 212 (1979). This Court in *Carbon*

Fuel established the legal precept regarding an action for damages. This litigation involves only injunctive relief and *Carbon Fuel* does not apply.

Fourth, the respondents elected not to respond to the numerous legal arguments in Part I of the petition, (Petitioner's Brief pages 8-11) regarding the errors committed in the lower courts.

Finally, labor arbitration is a favored alternative forum for dispute resolution. *United Steelworkers of America v. American Manufacturing Company,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Company,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corporation,* 363 U.S. 593 (1960) and Note, Labor Injunctions, Boys Markets and the Presumption of Arbitability, 85 Harv. L.R. 636, 637 (1972).

Recently, this Court re-examined the role of federal courts under Section 301 of the Labor Management Relations Act, *Groves v. Ring Screw Works,* 59 U.S.L.W. 4043 (U.S. December 10, 1990). In *Groves*, the Court ruled "Thus, under Section 301, as in other areas of the law, there is a strong presumption that favors access to a neutral forum for the peaceful resolution of disputes." 59 U.S.L.W. at 4045. Again, the Court in *Groves* relied on the Court's decision in *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960), wherein this Court ruled "the processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." 363 U.S. at 581 and *Groves* 59 U.S.L.W. at 4045.

II.

THERE IS A CONFLICT IN THE CIRCUITS WHETHER DISTRICT COURTS HAVE JURISDICTION TO ENJOIN "WILDCAT" STRIKES.

The respondents erroneously stated there is no conflict in the circuit courts on the issue whether district courts have jurisdiction to enjoin "wildcat" strike. The respondents have misread the cases and have attempted to confuse and create a

distinction between "jurisdiction" and "power". The authorities referred to in Part II of the Respondents' Brief, pages 6 and 7, establish that there is a conflict in the circuits, *International Detective v. International Brotherhood of Teamsters,* 614 F.2d 29 (1st Cir. 1980); *Elevator Manufacturer's Association of New York, Inc. v. Local 1,* 689 F.2d 382 (2nd Cir. 1982); *Jacksonville Maritime Association v. ILA,* 571 F.2d 309 (5th Cir. 1978); *Old Ben Coal Corp. v. Local Union No. 1487 of United Mineworkers of America,* 500 F.2d 950 (7th Cir. 1974); *Hardline Electric, Inc. v. IBEW, Local 1543,* 680 F.2d 622 (9th Cir. 1982), cert. den'd., 459 U.S. 1079 (1983).

In *Boys Markets,* this Court enunciated the standard for the issuance of injunctions in labor disputes. All circuits should apply the precept of *Boys Markets.*

III.

THIS CASE INVOLVES A SUBSTANTIAL QUESTION WHETHER FEDERAL COURTS HAVE JURISDICTION TO ENJOIN "WILDCAT" STRIKES.

The respondents contention that this case does not involve a substantial question for consideration by this Court totally ignores the concern the Court has for the peaceful resolution of industrial disputes. Respondents admit that there was a "wildcat" strike. That strike was in violation of the no-strike clause in the contract that respondents agreed to and executed.

This Court has reiterated on numerous occasions that its paramount concern in interpreting the Labor Management Relations Act is to provide remedies for the peaceful resolution of industrial disputes, *United Steelworkers of America v. American Manufacturing Company,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Company,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corporation,* 363 U.S. 593 (1960) and Note, Labor Injunctions, Boys Markets and the Presumption of Arbitability, 85 Harv. L.R. 636, 637 (1972). Indeed, the Court recently reviewed the role of federal courts under Section 301 of the Labor Management Relations Act, *Groves v. Ring Screw*

Works, 59 U.S.L.W. 4043 (U.S. December 10, 1990). The Court in *Groves* analyzed Section 203(d) of the Taft-Hartley Act; *United Steelworkers of America v. Warrior & Gulf Navigation Company,* 363 U.S. 574 (1960) and the Senate Report Number 105, 80th Congress 1st Session, p. 16 (1947) regarding the Taft-Hartley Act and ruled:

> Thus, under Section 301, as in other areas of the law, there is a strong presumption that favors access to a neutral forum for the peaceful resolution of disputes. 59 U.S.L.W. 4045.

Whether federal courts have jurisdiction under Section 301(a) of the Labor Management Relations Act to enjoin "wildcat" strikes involves all organized industries in the United States and every United States District Court.

CONCLUSION

Petitioner urges this Court to summarily reverse the court below and direct the court of appeals to apply the precept enunciated in *Boys Markets,* or in the alternative, to grant petitioner's writ of certiorari.

Respectfully submitted,

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Dated: January 23, 1991